

C.A.L.L.

October 1, 2014

City Attorney Law Letter

Issue 14-04



Each year the Springdale Police Department sponsors the "Shop With a Cop" program for children in our district that could use some help at Christmas. The School Resource Officers and School Counselors work together to select around 130 children. These children and their families show up at a Springdale Wal-Mart in early December, pair up with a police officer and get to shop. The children are required to spend 75% of their money on necessities, such as coats and shoes, but they also are allowed to spend 25% on a toy. What would Christmas be for a child without a toy, right?

Currently, the program has about \$20,000 in the bank, but are still raising money and receiving donations. Each Christmas, the City Attorney's Office makes a donation, and we ask that others donate to this great cause as well.

Shop With a Cop Program at Springdale Police Department



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Warrantless Arrest For Shoplifting Occurring Outside of Officer Presence

Recently, we have received some questions concerning when a law enforcement officer may make a warrantless arrest on a shoplifting offense that does not occur in the presence of the officer. Additionally, there appears to be confusion about the concept of "concealment" of an item on the suspect's person, and how that concealment may affect the officer's ability to make a warrantless arrest.

As explained below, shoplifting is to be treated as theft of property under Arkansas

Code Annotated Section 5-36-103, and "concealment" of an item on the suspect's person is irrelevant to the decision of whether an officer may make a warrantless arrest for shoplifting.

Shoplifting is Treated as Theft of Property Under A.C.A. § 5-36-103

Under Arkansas Code Annotated Section 5-36-102(a), "Conduct denominated theft ... constitutes a single offense embracing the separate offenses known before January 1,

1976, as: (1) Larceny; (2) Embezzlement; (3) False pretense; (4) Extortion; (5) Blackmail; (6) Fraudulent conversion; (7) Receiving stolen property; and (8) Other similar offenses." Therefore, shoplifting is prosecuted under the theft of property statute found at Arkansas Code Annotated Section 5-36-103.

Presumption of Theft

Under Arkansas Code Annotated Section 5-36-102(c), "The knowing concealment, upon an actor's person or the person of another, of an unpurchased good or merchandise offered for sale by any store or other business establishment, gives rise to a presumption that the actor took the good or merchandise with the purpose of depriving the owner or another person having an interest in the good or merchandise." Thus, when a suspect is caught concealing an item, this statute provides the prosecution with stronger evidence, or a presumption, that the suspect was in fact stealing.

The act of concealing is irrelevant to the decision on whether an officer may make a warrantless arrest. However, Arkansas Code Annotated Section 5-36-116, entitled "Shoplifting," allows for a police officer, merchant, or merchant's employee to detain a person caught concealing unpurchased merchandise in a reasonable manner and for a reasonable length of time "... in order that recovery of a good may be effected." Additionally, the statute at sub-section (b)(1) allows for the owner or operator of the store or the agent or employee of the owner or operator to detain a person when an anti-shoplifting device or inventory control device is activated by the person's exiting the establishment or protected area in the establishment. Finally, the statute provides

that any such detention "... does not render the law enforcement officer, merchant, or merchant's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention." The statute defines antishoplifting or inventory device as "... a mechanism or other device designed and operated for the purpose of detecting the removal from a mercantile establishment or similar enclosure or from a protected area within a mercantile establishment or similar enclosure."

When May an Officer Make a Warrantless Arrest for Shoplifting?

Under Arkansas Code Annotated Section 5-36-116, sub-section (d)(1) states that "Upon probable cause for believing a suspect has committed the offense of shoplifting, a law enforcement officer may arrest the person without a warrant." Additionally, sub-section (d)(2) says that "The law enforcement officer, merchant, or merchant's employee who has observed the person accused of shoplifting shall provide a written statement that serves as probable cause to justify the arrest." Therefore, so long as the merchant or merchant's employee provides the officer a written statement detailing the theft, then the officer may make a warrantless arrest for the theft, even if the theft did not occur in the officer's presence. Of course, a police officer may issue a citation for shoplifting in lieu of physical arrest should the officer decide that would be the better course of action in a particular case.

***Taylor Samples,
Deputy City Attorney***

8th U.S. Circuit Court of Appeals Holds That Jail Medical Staff Did Not Act With Deliberate Indifference and Did Not Use Excessive Force

Facts Taken From the Case: Troy Tucker was incarcerated as a pretrial detainee at the Pulaski County Regional Detention Facility (PCRDF) from September 28, 2009, until March 1, 2010. Shortly after his arrival to PCRDF, Tucker began complaining about certain medical issues, including a surgical thread that was protruding from a wound on his abdomen. Tucker received this surgical wound after undergoing bowel obstruction surgery around a year earlier. Tucker testified that the wound was not really infected upon his arrival to PCRDF. However, Tucker complained of bleeding from and severe pain around the surgical wound in a grievance dated September 30, 2009. According to Tucker, around the time he filed the grievance on September 30, Nurse Catherine Smith told Tucker that she did not have to treat the surgical wound because it predated his incarceration. Subsequently, in a grievance filed in early October of 2009, Tucker complained of pus and/or blood seeping out of the surgical wound that could lead to infection around the wound. Tucker filed a final grievance shortly thereafter with Randy Morgan, the Chief of Detention at PCRDF, where he reiterated his concerns about the wound.

On or about October 16, 2009, Tucker met with Dr. Carl Johnson, a physician who worked at PCRDF. During this visit, Tucker raised concerns about the surgical wound, as well as concerns about

numerous other medical issues, such as history of colon cancer, asthma, pain in the fingers and nose, and soreness around a port that was implanted underneath the skin on Tucker's chest to facilitate his previous chemotherapy treatment. According to Dr. Johnson's report, he ordered Tucker to continue taking various prescription medications, provided Tucker with cream for his hands, and had Tucker sign a form consenting to the release of his medical records to PCRDF. Dr. Johnson also examined Tucker's abdomen and noted that there was nothing unusual about Tucker's stomach that was a major concern at that point. According to Tucker, Dr. Johnson never examined the surgical wound visually by lifting Tucker's shirt. Dr. Johnson could not recall whether he performed a visual examination of the surgical wound at this time.

Within a week of Dr. Johnson's examination of Tucker, Tucker complained in a grievance appeal that Dr. Johnson had failed to examine the surgical wound and expressed concern over the possibility of an infection developing. On November 3, Tucker filled out a sick call form wherein he re-stated his concerns. On November 17, Tucker saw Dr. Johnson for a second visit, and it is not disputed that Dr. Johnson visually examined the surgical wound at this appointment. Dr. Johnson reported seeing a small purulent wound with a mild rash on Tucker's mid-abdomen that Dr.

Johnson described as minor. Dr. Johnson prescribed an oral antibiotic, antibiotic cream, and pain medicine as treatment for Tucker. According to Tucker, the surgical wound was still bleeding and draining pus when he left PCRDF.

On January 7, 2010, Tucker lost consciousness near the door of his cell. Several guards and nurses, including Nurse Rhonda Anderson and Nurse Donna Washburn, responded to the emergency medical code. Upon their arrival, Tucker alleged that Nurse Anderson administered an ammonia inhalant so that Tucker would regain consciousness. Tucker also alleged that while doing so, Nurse Anderson hit Tucker's nose with a blow that Tucker described as a karate hit. Tucker never received any medical treatment for his nose, which did not bleed, and the alleged karate hit did not leave a cut, a scratch, or a bruise. Tucker's contemporaneous descriptions of the incident contained in a grievance and appeal failed to mention the alleged karate hit. Before moving him from the floor, Tucker said that the nurses checked his heart rate and blood pressure and asked the guards to carry Tucker to his bed. Tucker said that the guards refused to help and that Nurse Anderson and Nurse Washburn proceeded to drag Tucker, who was six feet three inches tall weighing 170 pounds, by his arms to his bed. Tucker said that the nurses failed to gently place Tucker on his bed, but instead dropped him on the bed, which according to Tucker caused the middle part of his back to strike the side of the bed and left an injury to his back.

Tucker sued Dr. Johnson, Nurse Smith, Nurse Anderson, Nurse Washburn, Randy Morgan, Pulaski County Sheriff Doc

Holladay, and various other officials, alleging that he received constitutionally deficient medical care, and that medical officials used excessive force against him while responding to his medical emergency. The United States District Court granted the defendants' motions for summary judgment with respect to Tucker's Section 1983 claims and dismissed Tucker's state-law claims without prejudice. Tucker appealed the District Court's ruling to the 8th U.S. Circuit Court of Appeals.

Argument, Applicable Law, and Decision by the 8th U.S. Circuit Court of Appeals:

On appeal to the 8th U.S. Circuit Court of Appeals, Tucker argued that Dr. Johnson's failure to examine Tucker's surgical wound visually in October of 2009 amounted to deliberate indifference. In particular, Tucker claimed that a bloody, purulent, and painful surgical wound such as his is readily identifiable by a layperson as requiring medical treatment. In setting forth the rule on deliberate indifference, the 8th U.S. Circuit Court of Appeals (Court) said that whether an official was deliberately indifferent requires both an objective and a subjective analysis. The Court said that under the objective prong, Tucker must establish that he suffered from an objectively serious medical need. To be objectively serious, the Court stated that a medical need must have been diagnosed by a physician as requiring treatment, or must be so obvious that even a layperson would easily recognize the necessity for a doctor's attention. The Court said that under the subjective prong, Tucker must show that an official actually knew of but deliberately disregarded his serious medical need.

This requires a mental state akin to criminal recklessness, therefore a showing of negligence, even gross negligence, will not evince deliberate indifference. Finally, the Court said that merely demonstrating that a prison doctor committed medical malpractice is insufficient to establish deliberate indifference. An inmate must show that a prison doctor's actions were so inappropriate as to evidence intentional maltreatment or a refusal to provide essential care.

The Court affirmed the trial court and held that Dr. Johnson did not act with deliberate indifference. In its reasoning, the Court assumed that the surgical wound constituted an objectively serious medical need when Tucker first saw Dr. Johnson. However, in analyzing the subjective component of the deliberate indifference standard, the Court concluded that Tucker at most established that Dr. Johnson committed medical malpractice or acted with negligence, not deliberate indifference. The Court pointed-out that Dr. Johnson examined Tucker's abdomen in certain respects on October 16, and that Dr. Johnson's treatment notes confirmed as much. The Court also noted that Dr. Johnson ordered treatment for several of Tucker's other maladies, and the Court concluded that absent from the record was any evidence that Dr. Johnson's examination of Tucker's abdomen was so inappropriate as to evidence intentional maltreatment or a refusal to provide essential care.

Next, the Court analyzed Tucker's second claim that Nurse Anderson and Nurse Washburn used excessive force against Tucker while responding to Tucker's medical emergency. In setting forth the

rule, the Court said that the Due Process Clause of the Fourteenth Amendment protects pretrial detainees from the use of excessive force that amounts to punishment. Additionally, the Court said that since the Due Process Clause prohibits any punishment of a pretrial detainee, regardless of if the punishment is cruel-and-unusual or not, the Court must evaluate whether the defendant's purpose in using force was to injure, punish, or discipline the detainee. Furthermore, the Court stated that an official's use of force does not amount to punishment in the constitutional sense if it is but an incident of some other legitimate government purpose. Also, the Court said that conduct that is merely negligent or grossly negligent does not implicate the protections of due process. Finally, the Court noted that a de minimis quantum of force is not actionable under the Due Process Clause.

The Court held that Nurse Anderson's act of hitting Tucker's nose was a de minimis use of force that is not actionable under the Due Process Clause. The Court noted that Tucker never saw a doctor or a nurse for treatment to the nose, and no injury resulted from the alleged hit to Tucker's nose. Also, the Court reasoned that Tucker filed a grievance against Nurse Anderson which detailed specific incidents about her behavior, and nowhere in the grievance did Tucker mention being hit in the nose by Nurse Anderson.

The Court also concluded the force used by the nurses to move Tucker to his bed was incidental to their legitimate purpose of responding to and mitigating Tucker's medical emergency. The Court said that there was no indication in the record that

the nurses' purpose in moving Tucker to his bed was anything other than responding to and mitigating the medical emergency. The Court reasoned that even if the injuries to Tucker's hip and back resulted from being dropped on the bed by the nurses, Tucker's minor injuries were, under the circumstances, an insufficient basis to infer that the nurses' purpose was to punish, injure, or discipline Tucker. The Court said that at most Tucker's injuries suggest that the nurses should have insisted on having assistance before moving Tucker or failed to use due care when moving him by themselves, but the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on June 27, 2014, and was an appeal from the United States District Court for the Eastern District of Arkansas. The case citation is *Jackson v. Buckman*, ___ F.3d ___, (2014).

Taylor Samples
Deputy City Attorney

8th U.S. Circuit Court of Appeals Holds Jailers and Jail Administrator Not Entitled to Qualified Immunity Following Prisoner Taser

Facts Taken From the Case: Dwain Smith, a Vietnam War veteran, was arrested on the morning of February 28, 2012, for delivering a controlled substance (hydrocodone), and Smith was taken to the jail in Conway County, Arkansas. During the intake process, Smith told the jailers that he suffered from lower back pain and had other medical issues, including post-traumatic stress disorder. After being in jail for eight hours, Smith told the jailers that he was in pain. The jailers gave Smith ibuprofen, but denied Smith's requests for his prescription medications and for

medical care. About an hour later, jailers Jacob Zulpo and Jansen Choate took Smith to a different cell block where Smith was placed in a cell by himself. Smith was fully compliant during the move and needed no assistance.

A few hours later, Smith began to yell that he was in pain. Conway County Jail Administrator Rick Emerson instructed Zulpo and Choate to take Smith to the jail's medical observation cell. Upon entering Smith's cell, Zulpo and Choate found Smith to be lying down, rocking back and forth,

and moaning. What happened after this point is disputed. Zulpo said that he placed his hand on Smith's shoulder and that Smith started to violently push and kick at Zulpo. Zulpo then applied a pressure point to Smith's ear to get his attention, and Smith sat up and retreated back into the bunk away from Zulpo and Choate. About this time, according to Choate, Zulpo was trying to get ahold of Smith to control him, and in the process was accidentally kicked in the mouth by Smith. Choate believed that the kick was unintentional. According to Zulpo, Smith kicked him in the chest. According to Smith, he accidentally kicked Zulpo either during the subsequent tasing process, or alternatively, in the reaction to the pressure point technique.

Smith said that the jailers then asked him to get up off of his bunk, and Smith replied that he was in pain and could not get up. Choate then handed a taser to Zulpo, who told Smith that he needed to comply or else he would be tased. Zulpo then tased Smith, who was shirtless, in the abdomen so that the taser probes inserted into Smith's skin. Smith almost fell off of the bunk, but was caught by Zulpo. Smith again told Zulpo that he could not get up, and Zulpo responded that Smith needed to comply with the orders so that "... we don't have to do this anymore." Smith repeatedly stated that he could not get up, and Zulpo responded that he and Choate could not help Smith and that Smith had to get up on his own. While Smith was attempting to sit up, Zulpo tased Smith a second time and said "We can do this all night." Smith then fell to the floor, crying. During the entire encounter, Smith did not move toward the jailers at all or act hostile. Eventually, Smith got up, picked up his

mat, and walked to the front of the jail. When Smith leaned on the wall for support, Zulpo threatened to tase him again.

According to Choate, before the incident with Smith, Jail Administrator Emerson told Choate that he was authorized to use a taser on any inmate in order to get the inmate to comply with the order. Emerson also had posters placed throughout the jail stating that inmates who did not comply with jailers' verbal commands were subject to punishment. Before tasing Smith, Zulpo had not received any type of training on the use of tasing. Emerson told Zulpo and all the jailers to get a taser and use it if needed, meaning use it for protection, for compliance, or if the jailer is in danger. The signs warning inmates that failure to comply with verbal commands could result in tasing were placed in the booking area and in the window to each cell block, and the postings were all signed by Emerson.

Smith filed a lawsuit under 42 U.S.C. § 1983 alleging excessive use of force by Zulpo and Choate and a failure to train or supervise by Emerson in their individual and official capacities. Smith also brought claims against the county and Sheriff Mike Smith in his official capacity. The United States District Court for the Eastern District of Arkansas denied qualified immunity to Zulpo, Choate, and Emerson, and denied summary judgment to the county and to the four individual defendants in their official capacities on all claims but one. The defendants then appealed the decision to the United States Court of Appeals for the Eighth Circuit.

Argument, Applicable Law, and Decision by the Eight U.S. Circuit

Court of Appeals: Before addressing the arguments of each particular defendant, the U.S. Court of Appeals for the Eighth Circuit (Court) set forth the rule on qualified immunity. The Court said that in resolving questions of qualified immunity at summary judgment, it engages in a two-pronged inquiry. First, it asks whether the facts, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a federal right. If so, the Court must then ask whether the right in question was clearly established at the time of the violation. The Court said that a right is clearly established if its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right. Additionally, the Court stated that the Fourteenth Amendment gives state pretrial detainees (as the Fifth Amendment gives federal pretrial detainees) rights which are at least as great as the Eighth Amendment protections available to a convicted prisoner. Finally, the Court said that the Due Process Clause prohibits any punishment of a pretrial detainee, be that cruel and unusual punishment or not.

Additionally, the Court said that in excessive force cases, the core judicial inquiry is whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Whether the force used was reasonable is judged from the perspective of a reasonable officer on the scene and in light of the particular circumstances. The Court stated that in making this determination, it may evaluate the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts

made to temper the severity of a forceful response. Lastly, the Court referenced language from its prior decision in the case of *Hickey v. Reeder*, 12 F.3d 754 (8th Cir. 1993), where it held that the Constitution does not permit use of summary force to compel compliance with any direct order given in a jail setting, and that such authority is not necessary to maintain control of the institution. The Court said that in the *Hickey* case, it explained that "this represents a fundamental misunderstanding of the law concerning the use of summary force in prison settings," and that "the law does not authorize the day-to-day policing of prisons by stun guns." The Court opined that in the *Hickey* decision, it noted that "as a matter of law, the use of a stun gun to enforce the [order of the prison official] ... was both an exaggerated response to the inmate's misconduct and a summary corporal punishment that violated the inmate's Eighth Amendment right to be free of cruel and unusual punishment."

The Court then turned its attention to Jailer Zulpo's conduct toward Smith at the Conway County jail. The Court held that as to the first taser strike, a jury could credit Jailer Choate's observations that Smith's kick to Zulpo was accidental and unintentional, and that a reasonable officer would not respond to an accidental and unintentional kick by deploying a taser. The Court then turned its attention to the second taser strike. The Court said that the events as described by the jailers themselves show that the second taser shot was fired for the purpose of achieving compliance, and a jury could find that Smith was nonviolent and an objectively reasonable officer would not have used a taser on Smith. Furthermore, the Court

said that viewing the evidence in the light most favorable to Smith, it sees a nonviolent pretrial detainee in pain, seeking help, having taser probes affixed to his abdomen, no longer acting aggressively toward the jailers (if he ever was), and attempting to comply with Zulpo's order to get up. For these reasons, the Court affirmed the trial court's denial of Zulpo's qualified immunity claim.

In analyzing Jailer Choate's conduct, the Court said that a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge. The Court noted that although given ample opportunity to intervene after Zulpo's warning to Smith, Choate failed to intervene when Zulpo tased Smith the second time. Therefore, the Court held that the trial court correctly concluded that when viewing the facts in the light most favorable to Smith, Choate violated Smith's clearly established constitutional right to be free from excessive force, and Choate is not entitled to qualified immunity at this stage.

Finally, the Court turned its attention to

Administrator Emerson's conduct. The Court said that in order to succeed on his claim against Emerson, Smith must prove that Emerson personally knew of the constitutional risk posed by his inadequate training or supervision and proximately caused Smith's injury by failing to take sufficient remedial action. The Court then noted that the trial court concluded that Emerson was on duty the night Smith was tased, communicated with Zulpo and Choate about Smith that night, permitted Zulpo and Choate to use tasers in the past, and posted signs on the jail walls warning prisoners they would be tased for non-compliance. Given these factual findings, the Court affirmed the trial court's denial of qualified immunity to Emerson as well.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on July 16, 2014, and was an appeal from the United States District Court for the Eastern District of Arkansas. The case citation is *Smith v. Conway County, Arkansas*, ___ F.3d ___, (2014).

Taylor Samples
Deputy City Attorney

Arkansas Court of Appeals Affirms Conviction for DWI and Holds That Consent Not Needed Before Having Suspect Do Field Sobriety Tests

Facts Taken From the Case: Springdale Police Officer Rusty Boyd was on patrol on the evening of October 23, 2012, when he observed a white Nissan Maxima cross the centerline of the road on multiple occasions. Officer Boyd made a traffic stop on the vehicle and made

contact with the driver, Courtney Tiller. Officer Boyd noticed that Tiller's eyes were bloodshot and watery; that her actions were lethargic and exaggerated; and that her speech was slow and deliberate. Tiller produced her license to Officer Boyd, but she was not able to produce her proof of insurance or registration. Officer Boyd later found these documents in Tiller's glove box. Tiller denied that she had been drinking alcohol, but Tiller told Officer Boyd that she had taken a Celexa for depression about one hour prior to the stop. Officer Boyd in his testimony to the Court noted that Celexa was a CNS depressant, and that a person can be intoxicated on a CNS depressant.

Based on Tiller's movements, speech, and consumption of a CNS depressant, Officer Boyd asked Tiller to step out of her car, and Officer Boyd advised Tiller that he was going to administer three field sobriety tests. Officer Boyd saw that Tiller demonstrated six of six indicators of impairment on the horizontal gaze nystagmus test, six of eight indicators of impairment on the walk and turn test, and three of four indicators of impairment on the one leg stand test. Based on his observations of Tiller before the testing and her failure of the field sobriety tests, Officer Boyd believed that Tiller was intoxicated and not able to safely operate her vehicle. Officer Boyd concluded that this constituted probable cause sufficient to support her arrest for DWI. Officer Boyd then transported Tiller to the jail, where he read her the implied-consent form. Tiller initialed the form, but she refused to take the test. Tiller was charged with DWI, violation of implied consent, and left of center.

The Washington County Circuit Court found Tiller guilty of DWI and sentenced her to 365 days in the county jail, credit for one day served, with the other 364 days suspended. Tiller was also assessed court costs of \$300, and a fine of \$200.

Argument and Decision by the Arkansas Court of Appeals:

On appeal to the Arkansas Court of Appeals (Court), Tiller argued that the trial court erred in denying her motions to suppress the results of the three field sobriety tests and evidence of her refusing to take a breath test. In particular, Tiller argued that the results of the field sobriety tests should have been suppressed because Tiller's Fourth Amendment rights had been violated since Officer Boyd conducted a warrantless seizure without her consent. Additionally, Tiller claimed that evidence of her refusal to take the breath test should have been suppressed since she had the constitutional right to refuse the test because it was a warrantless search; since it was not evidence of consciousness of guilt; and since its probative value would be substantially outweighed by the danger of unfair prejudice or confusion of the issues.

The Court first addressed Tiller's claim that the trial court erred in denying her motion to suppress evidence of the field sobriety results because Officer Boyd had no warrant to administer the tests and failed to obtain Tiller's consent to perform the tests. In setting forth the applicable law, the Court noted that an officer's actions in ordering the defendant out of his parked truck to investigate a DWI constitute a seizure under the Fourth Amendment. *Frette v. City of Springdale*, 331 Ark. 103

(1998). However, the Court said that the Arkansas Supreme Court in the *Frette* case has also held that such a warrantless intrusion is permitted when the officer has reasonable suspicion under Rule 3.1 of the Arkansas Rules of Criminal Procedure to suspect that the occupant of a parked car is about to commit a DWI. Furthermore, the Court quoted Rule 3.1 in its entirety:

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

The Court stated that reasonable suspicion means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion. Finally, the Court said that the justification for an investigative stop depends upon whether, under the totality of the circumstances, the

police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity.

The Court held that Tiller's arrest was lawful since it was supported by probable cause, and that Tiller's consent to take the field sobriety tests was not required. The Court reasoned that based on Arkansas Rules of Criminal Procedure 2.1 and 3.1, there was no Fourth Amendment violation because Officer Boyd's warrantless seizure (commanding Tiller to perform the field sobriety tests) was based on his reasonable suspicion that Tiller had committed the offense of DWI. The Court noted that Officer Boyd observed Tiller repeatedly cross the center line; observed that Tiller had bloodshot and watery eyes; observed that Tiller had lethargic and exaggerated actions and slow, deliberate speech; and saw that Tiller could not produce her insurance or registration documents. Additionally, the Court pointed out that Tiller admitted to Officer Boyd that she had taken a CNS depressant about an hour prior to the traffic stop.

Furthermore, the Court held that Officer Boyd had probable cause to arrest Tiller without consideration of the field sobriety tests. The Court noted that a police officer may arrest a person without a warrant if the officer has probable cause to believe that such person has committed the offense of driving while intoxicated. The Court concluded that the testimony of Officer Boyd describing his observations of Tiller leading up to the field sobriety tests gave rise to probable cause that Tiller was driving while intoxicated.

In addressing Tiller's second argument that the trial court erred in denying her motion

to suppress evidence that she refused to consent to take the breath test, the Court held that no Fourth Amendment violation occurred because Tiller's consent to testing was implied, and no warrant was required. The Court reasoned that the collection and testing of a person's blood, breath, or urine constitutes a search under the Fourth Amendment, and thus requires a warrant or an exception to the warrant requirement. The Court said that the Arkansas implied-consent law, found at Arkansas Code Annotated Section 5-65-202, provides an exception to the warrant requirement:

(a) Any person who operates a motor vehicle or is in actual physical control of a motor vehicle in this state is deemed to have given consent, subject to the provisions of § 5-65-203, to one (1) or more chemical tests of his blood, breath, saliva, or urine for the purpose of determining the alcohol or controlled substance content of his or her breath or blood if: (3) At the time the person is arrested for driving while intoxicated, the law enforcement officer has reasonable cause to believe that the person, while operating or in actual physical control of a motor vehicle, is intoxicated or has an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood.

The Court concluded that based on this statute, Tiller's consent to testing was implied, and no warrant was required for the search.

In addressing Tiller's third and final argument, that evidence of Tiller's refusal

to submit to the breath test should be suppressed because the prejudicial effect of that evidence greatly outweighs its probative value, the Court held that the trial court did not err in refusing to suppress that evidence. The Court reasoned that evidence of a defendant's refusal to take a breath test is independently relevant on the issue of intoxication and therefore is properly admitted as circumstantial evidence showing a consciousness of guilt. See *Medlock v. State*, 332 Ark. 106 (1998), and *Spicer v. State*, 32 Ark. App. 209.

For all of the above reasons, the Court affirmed the trial court's denial of Tiller's motions to suppress, and Tiller's conviction for DWI was affirmed.

Case: This case was decided by the Arkansas Court of Appeals on August 27, 2014, and was an appeal from the Washington County Circuit Court, Honorable Judge William A. Storey. The case citation is *Tiller v. State*, 2014 Ark. App. 431.

Taylor Samples
Deputy City Attorney



U.S. Eighth Circuit Affirms in Part and Reverses in Part on Denial of Qualified Immunity, Each Physical Act Examined: Blazek v. City of Iowa City

Summary:

The United States Court of Appeals for the Eighth Circuit on August 5, 2014 issued an opinion in the case of *Blazek v. City of Iowa City* in part affirming and in part reversing the decision by the District Court for the Southern District of Iowa to deny the motion for summary judgment filed by Defendants, Iowa City, Iowa, Officer Dan Roth and Officer Juan Santiago based on qualified immunity. The decision, rendered on an interlocutory appeal, cleared the way for trial in that case. The Eighth Circuit reviewed each act in a series of actions and determined that one act, that of roughly lifting a subdued, hand-cuffed individual from the floor, could arguably be the basis for a jury verdict against the officers and the City. The dissent argued that each act should be viewed in connection as an unbroken sequence of events, thus removing qualified immunity from the totality of events.

Facts:

In February 2009, Blazek was the roommate of Richard Feldhacker, who was on federal parole. As a condition of Feldhacker's parole, he agreed to warrantless searches of his residence. Feldhacker had disclosed in earlier monthly reports to

his probation officer that he had a roommate, but his most recent monthly reports had not named a roommate.

After Feldhacker failed a drug test, his parole officer requested that Officer Juan Santiago of the State of Iowa conduct a home check. Santiago was a High Risk Unit Parole/Probation Officer whose main duty was to conduct home checks. On February 24, 2009, around 6 p.m., [*3] Santiago arrived at Feldhacker's apartment. He observed lights on in the apartment, so he knocked on the door. Santiago says that he heard someone approach the door and saw someone look out the peephole. Santiago identified himself as "Probation." He avers that the person behind the door then ran away and that he promptly heard a toilet flush.

Santiago requested backup from the Iowa City Police Department. Officer Dan Roth arrived in response, just as the apartment manager was unlocking Feldhacker's door for Santiago. Santiago and Roth entered the apartment; Santiago led with his gun drawn. They encountered Blazek, who was walking out of the bathroom wearing only a towel.

Santiago did not recognize Blazek, but he knew Blazek was not Feldhacker. According to Blazek, he never heard the knock at the door and did not look through the peephole or run away to flush the toilet.

The officers cleared the apartment, and all three men entered Blazek's bedroom. The officers asked Blazek to sit on his bed and to identify himself. Blazek was "belligerent," refused to identify himself except as "the roommate," and would not stay seated as directed. According to the officers, Blazek smelled of alcohol, [*4] and Blazek acknowledges drinking one or two beers that evening.

Blazek asserts that Santiago was yelling at him and accusing him of flushing drugs down the toilet. According to Blazek, he eventually responded to Santiago's yelling by saying that perhaps he should talk to a lawyer. Blazek says that Santiago then grabbed his arm, twisted the arm up behind him, and threw him to the ground, while Roth jumped on him and handcuffed him. Blazek alleges that after he was handcuffed, the officers grabbed his arms and "jerked" him up onto his bed.

The officers left Blazek handcuffed and sitting on the bed while they searched the apartment. Blazek was then allowed to dress and leave the apartment. At the time, Blazek did not complain of pain. But the next day, after going to work, Blazek went to a doctor and was diagnosed with a

separated shoulder and an ankle fracture, described as a "small chip fracture." Medical records from a later visit in May 2009 show a torn rotator cuff, and the district court reasoned that a jury could find that all of the injuries resulted from the force applied by Santiago and Roth.

Blazek v. City of Iowa City, 2014 U.S. App. LEXIS 15008, 2-4 (8th Cir. Iowa Aug. 5, 2014)

Law:

The defense sought to invoke the doctrine of qualified immunity. Qualified immunity is a federal common law defense in civil rights actions in which the officer's actions are compared to a "reasonable officer" standard. It assumes the officer was knowledgeable of current law at the time of the act. Qualified immunity insulates from liability the actions of a law enforcement officer reasonably acting within the scope of his or her duties and in accordance with the law. The court summarized the doctrine in recent case cites.

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who [*6] knowingly violate the law." *Stanton v. Sims*, 134 S. Ct. 3, 5, 187 L. Ed. 2d 341 (2013) (internal quotations omitted). The officers are entitled to qualified immunity unless (1) the evidence, viewed in the light most favorable to [the Defendant], establishes a violation of a constitutional or statutory right, and (2) the right was clearly established

at the time of the violation, such that a reasonable official would have known that his actions were unlawful. See *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

Blazek v. City of Iowa City, 2014 U.S. App. LEXIS 15008, 5-6 (8th Cir. Iowa Aug. 5, 2014)

In the absence of qualified immunity, officers and municipalities accused of civil rights violations must defend their position on the merits, possibly in front of a jury.

Analysis:

The Federal District Court ruled that the application of qualified immunity would be denied in its entirety because any act that could arguably be considered as a violation of civil rights completely invalidated that doctrine. The Plaintiff, Blazek, had not won at the District Court level. He merely obtained a favorable ruling that would keep his case alive and possibly get it to a jury. The Defendants had lodged an interlocutory appeal because they had not won on their motion for summary judgment. When the motion for summary judgment was denied, the Defendants appealed claiming the ruling was wrong by law.

An appellate review of denial of qualified immunity is *de novo*. In other words, the appellate court reviews the facts without regarding the inferior court ruling. In reviewing the appeal, two of the three reviewing judges of the Eight Circuit reviewed each separate act, in effect, choreographing the sequence of events in question. They first looked at the act of

placing Blazek in handcuffs. The fact pattern was that an officer grabbed Blazek's arm, twisted the arm up behind him, and threw him to the ground, while another officer jumped on Blazek and handcuffed him. The Court compared this act to other cases in which grabbing, twisting and jerking the arm up high to the shoulder were "a relatively common and ordinarily accepted non-excessive way to detain an arrestee." *Blazek v. City of Iowa City*, 2014 U.S. App. LEXIS 15008 (8th Cir. Iowa Aug. 5, 2014). The fact that an injury may have resulted from this degree of force was not foreseeable and not a bar to qualified immunity. "Qualified immunity protects officers who used essentially the same maneuver in this case, even if it happened to cause more serious injury. Cf. *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011) (explaining that '[t]he governing rule should not turn on . . . unpredictable and fortuitous consequences of an officer's use of force')." *Id.*

The judges characterized this level of use of force used in hand cuffing Blazek as residing on the "hazy border between excessive and acceptable force." *Id.*, quoting *Saucier v. Katz*, 533 U.S. 194, 206, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). But even so, the Court, quoting from *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011), held that to prevail the Plaintiff must show that every reasonable official would agree that the conduct in question violates a constitutional right and that the constitutional question is beyond debate. In so doing, the Court also held that the result alone of an application of force would not determine whether qualified immunity is appropriate.

The issue of whether to apply hand cuffs in the first place was not in dispute. The majority noted, and the dissent did not disagree, that application of hand cuffs during a *Terry* stop can be a reasonable precaution. This is considered settled law.

The Court then examined the act of jerking the Plaintiff from the floor to his bed. The Court referred to this as a "discrete use of force." *Blazek*, 2014 U.S. App. LEXIS 15008. The Court noted that Blazek was not suspected of any serious offense and that once the hand cuffs were applied, he was under control, presenting no further resistance or threat. The allegation was that officers did more than raise Blazek up roughly. So on this point, the Court reasons, if proven at trial that he was "gratuitously 'jerked' from the floor" a reasonable jury could find for the Plaintiff. *Id.*

Dissenting opinions are not law. But they are worth noting as majorities change and present day dissents may become future majority opinions. In this case, the dissenting judge reasoned that the application of handcuffs and the subsequent movement from the floor to the bed was really one "unbroken sequence of events." In essence, the dissent agreed with the Federal District Court. The implication of this analysis would be to make it easier to deny qualified immunity as a defense by lumping all activities together. In this case, the alleged activities were grabbing, twisting, throwing, jumping on, holding, and jerking. Taken together, the dissent reasons, these acts could be viewed by a reasonable jury as violating the Fourth Amendment to the United States Constitution.

Important points:

- Handcuffing a subject in a *Terry* stop can be viewed as reasonable, if other circumstances dictate. In this case, the circumstances were a felony arrest entry, an unidentified subject, suspicion of evidence dissipation and attendant concern for officer safety.
- An officer need not specifically anticipate the consequences of an act of applying necessary force, so long as the act itself is reasonable. In this case, the act of grabbing and twisting the arm while throwing a person to the ground for the purpose of hand cuffing did not bar qualified immunity, even though injury *may* have resulted from those acts.
- Once the suspect is in hand cuffs, the justification for levels of force diminishes where the suspect no longer constitutes a threat. Any force applied beyond the point where the subject is subdued will be critically scrutinized. Here, the possibility of proof at trial of "gratuitously jerking" a detainee from the ground while in hand cuffs resulted in an actionable case.
- Stay away from the "hazy border between excessive and acceptable force" where possible.

Case: *Blazek v. City of Iowa City* 2014 U.S. App. LEXIS 15008.

***David Phillips,
Deputy City Attorney***

C.A.L.L.

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Springdale City Attorney's Office
201 Spring Street
Springdale, AR 72764
(479) 750-8173